No. 15885.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CHARLES H. RUTHERFORD,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE.

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Basis of Jurisdiction.

This is a criminal action. Jurisdiction of the District Court was invoked under 18 U. S. C., Sec. 3231. The subject information was filed September 6, 1957 [T. R. 3].* The appellant was charged therein with wilful failure to register and pay the occupational tax on wagering in violation of Section 7203, Title 26, United States Code (International Revenue Code of 1954). That section provides in pertinent part as follows:

> "Any person required under this title to pay any . . . tax, . . . who wilfully fails to pay such . . . tax . . . at the time or times required by law or regulations, shall in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than one year, or both, together with the costs of prosecution"

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*References to the Transcript of the Record will be prefixed with the letters "T. R."

The appellant filed a Motion for Return of Personal Property and to Suppress Evidence [T. R. 18-22] which was denied [T. R. 34].

Following a trial by the Court without a jury the appellant was adjudged guilty [T. R. 37]. Appellant's motion for a new trial [T. R. 35-36] was denied by the Court [T. R. 37] and it was adjudged that the appellant pay a fine in the sum of $2,500.00 [T. R. 38]. Judgment was entered January 20, 1958 [T. R. 37]. Notice of appeal was filed by the appellant on January 21, 1958. This Court has jurisdiction under Title 28, United States Code, Section 1291.

Statement of the Case.

Appellee filed an Information in the United States Court, Southern District of California, Central Division, No. 26197-Criminal-CD against Charles H. Rutherford, the appellant, which charged as follows:

During the tax year beginning July 1, 1957, and up to and including August 15, 1957, defendant Charles H. Rutherford engaged in the business of accepting wagers with respect to horse races, and received wagers with respect to horse races within the meaning of Title 26, Section 4401c, United States Code; by reason of such activity he was required by law to register and to pay the occupational tax (wagering) as required by Sections 4411 and 4412 of the Internal Revenue Code, 1954, to the District Director of Internal Revenue at Los Angeles, California, within the Central Division of the Southern District of California; and, well knowing these facts, the defendant did wilfully and knowingly fail to register and to pay said tax to said District Director or to any other proper officer of the United States, in violation of Section 7203, Title 26, United States Code.

The portion of the evidence contained in the condensed narrative statement of testimony filed by the appellant herein is as follows:

The defendant did not register or pay a wagering occupational tax required of one engaged in the business of accepting and receiving wagers with respect to horse races.

On several occasions between July 25, 1957, and August 15, 1957, the defendant was seen by Federal agents and Los Angeles County deputy sheriffs driving into an auto park adjoining Mark's Restaurant in Compton at approximately 6:00 P. M. On these occasions he would meet Howard Cupp (a co-defendant adjudged by Judge Westover not guilty of failing to pay a wagering occupational tax in a consolidated trial with the defendant), who approached the defendant's automobile and handed him a rolled up package of papers.

On some occasions Monica Kissel (a co-defendant with Howard Cupp against whom the charges were dismissed on motion of the United States Attorney) met Howard Cupp at the place designated and received from a [58] rolled up package of papers.

On one occasion an unidentified woman met the defendant at the place designated and handed him a package of rolled up papers.

On August 15, 1957, at approximately 6:00 to 6:15 P. M. the defendant was seen by a deputy sheriff at the same auto park meeting Cupp and a package passing from Cupp to the defendant; shortly thereafter Federal Agent Katayama knocked on the door of Apartment F, 110 North Burris, Compton, California, and said: "Open up. We are federal officers and have a search warrant." After

waiting 20 to 25 seconds and receiving no response, the federal agent in the company of deputy sheriffs broke the door down and entered the apartment. He saw the defendant seated on a couch stuffing some papers underneath the seat, and there was a brown paper bag containing a number of papers at his feet. A copy of the search warrant was given to the defendant approximately twenty minutes before leaving the premises.

It was stipulated that Deputy Sheriff Carl Seltzer would testify that pieces of paper in the brown paper bag and under the cushion of the couch contained notations of purported bets on horse races and figures showing the totalization of wins and losses on the said purported bets.

All of these papers were seized by the federal agent at the said apartment.

The handwriting of the purported bets was identified as the handwriting of Howard Cupp, and the handwriting of the totalization figures showing the wins or losses was identified as the handwriting of the defendant.

Federal Agents Ness and Katayama held a conversation with the defendant at the said apartment on August 15, 1957, in which they asked him what the papers were and the defendant replied that they were betting markers that he picked up from a clerk of Swede's at the Mark's Restaurant auto park. The defendant was asked what he was doing with them, and he replied that he was just figuring the wins and losses and that Swede would come around about 10:00 o'clock each night and pick them up. The defendant [59] stated he was getting $150.00 a week for his services. When asked if he knew he was required to have a wagering stamp, he said he did not need a stamp because he was not a bookmaker.

Questions Presented.

1. Did the Court properly deny the motion to suppress evidence?

2. Was the evidence sufficient to establish the guilt of the appellant?

3. Was the proper venue established for this action?

ARGUMENT.

I.

The Court Properly Denied the Motion to Suppress Evidence.

The motion to suppress [T. R. 18-22] involved a search of premises under authority of a duly issued search warrant [T. R. 22-24]. Said warrant was issued by the United States Commissioner after his finding that the affidavits submitted to him [T. R. 26-33] showed sufficient probable cause to justify the issuance of said warrant.

Where affidavits are submitted to a United States Commissioner for purposes of having a search warrant issued, he is to exercise his own judgment as to whether the facts alleged in the affidavits constitute probable cause. Unless that judgment is *arbitrarily* exercised, his determination that probable cause exists is conclusive.

> *Gracie v. United States,* 15 F. 2d 644, 646 (1st Cir.), cert. den. 273 U. S. 748.

A full-scale hearing was held on the motion to suppress evidence [T. R. 34] which was then denied by the Court below [T. R. 34] upon a finding that the facts submitted to the United States Commissioner were sufficient for the issuance of the search warrant. This factual determina-

tion, therefore, has already been made twice, once by the United States Commissioner based on affidavits of the law enforcement officers, and a second time by a United States District Judge following a hearing during which a full presentation of the facts relative to the question of probable cause through testimony of witnesses was had.

The burden is on the moving party to adduce facts in support of his motion.

United States v. Warrington, 17 F. R. D. 25 (N. D. Cal., 1955);

Wilson v. United States, 218 F. 2d 754 (10th Cir.);

Nardone v. United States, 308 U. S. 338.

If the affidavits in support of a search warrant contain facts from which a reasonably prudent man would find probable cause the warrant is valid.

Carney et al. v. United States, 163 F. 2d 784 (9th Cir.), cert. den. 332 U. S. 824.

The United States Supreme Court defined probable cause as follows:

> "Since Marshall's time, at any rate, it has come to mean more than mere suspicion: Probable cause exists where 'the facts and circumstances within their [the officers'] knowledge *and of which they had reasonably trustworthy information* [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed. *Carroll v. United States,* 267 U. S. 132, 162." (Emphasis added.)

Brinegar v. United States, 338 U. S. 160, 175.

In line with this definition it has been repeatedly held that not only what was directly seen and heard by the searching officers but also what they were told by others, including other officers and informers, is relevant and admissible as bearing on the issue of probable cause.

Carroll v. United States, 267 U. S. 132, 161;

Gilliam v. United States, 189 F. 2d 321 (6th Cir.);

United States v. Vatune, 292 Fed. 497 (N. D. Cal.);

United States v. Li Fat Tong, 152 F. 2d 650 (2d Cir.);

Bradford v. United States, 194 F. 2d 168 (6th Cir.);

Husty v. United States, 282 U. S. 694.

"In determining what is probable cause, we are not called upon to determine whether the offense charged has *in fact* been committed. We are concerned only with the question whether the affiant had reasonable ground at the time of his affidavit and the issuance of the warrant for the belief that the law was being violated on the premises to be searched; and if the apparent facts set out in the affidavit are such that a reasonably discreet and prudent man would be led to believe that there was a commission of the offense charged, there is probable cause justifying the issuance of a warrant." (Emphasis added.)

Dumbra v. United States, 268 U. S. 437.

The determination by the United States Commissioner that the facts set forth in the subject affidavits and the further finding by the Court below that such determination was not arbitrary and therefore conclusive under *Gracie v. United States, supra,* should stand.

II.

The Evidence Was Sufficient to Establish the Guilt of the Appellant.

The occupational tax on wagering is imposed upon:

(1) Each person who is engaged in the business of accepting wagers.

(2) Each person who is engaged in receiving wager for or on behalf of any such person.

Internal Revenue Code of 1954, Secs. 4401(c), 4411.

In other words, it applies to a principal or an agent who accepts wagers for or on his behalf. It does not apply to a so-called "pick-up man."

United States v. Calamaro, 354 U. S. 351.

To be liable for the tax it is not necessary that a person engaged in the business of accepting the wagers physically receive them.

Treasury Reg. 132, Sec. 325.25.

United States v. Calamaro, supra.

The information [T. R. 3-4] and bill of particulars [T. R. 9-17] do not charge defendant with being a pick-up man. He is charged with being a principal. The trial court had before it the *Calamaro* case, *supra,* and based upon the evidence placed before it, found the appellant guilty as a principal. The defendant Cupp was found not guilty as not being among the classes of persons against whom the occupational wagering tax is imposed [T. R. 43].

A factual question was presented to the trial judge as to whether, based upon all the testimonial and documen-

tary evidence before him, the appellant was a principal, as contended by the Government, or a mere pick-up man, as claimed by him. Based on all the evidence before him, and not merely the self-serving declarations made by the defendant to the arresting officers and which were not corroborated by him during the trial, the trial judge found, as a matter of fact that the appellant was a principal, and as a matter of law, under the *Calamaro* case, *supra,* that he was subject to the payment of the occupational tax on wagering.

There was ample evidence introduced during the trial upon which to base the trial judge's finding that appellant was engaged in the business of receiving wagers. The appellant did not take the witness stand to rebut that evidence. The facts as to the role played by him in this operation were within his knowledge, and he failed to dispute those facts at his peril once he assumed the burden of going forward with the evidence.

III.

The Venue of This Action Is Proper.

The appellant was charged in the information with engaging in the business of receiving wagers without having registered and paid the occupational tax on wagering [T. R. 3].

No person shall engage in the business of receiving wagers until he has registered and paid the occupational tax on wagering.

Internal Revenue Code of 1954, Secs. 4412, 4901; Treasury Reg. 132, Sec. 325.50.

Venue of prosecution for nonpayment of wagering tax is where the act of conducting the business of wagering is committed.

United States v. Bowman, 137 Fed. Supp. 385 (D. C., 1956);

Beach v. United States, 240 F. 2d 888 (D. C. Cir., 1957).

There was ample evidence before the trial judge that appellant was engaged in the business of receiving wagers within the Southern District of Southern California and he so held. Venue is therefore proper.

Conclusion.

It is respectfully submitted that the judgment of conviction and the order denying appellant's motion for a new trial should be affirmed.

Respectfully submitted,

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